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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 848

JOHN F. FIXA, Individually and as Postmaster, San Francisco, California; JOHN A. GRONOUSKI, Individually and as Postmaster General of the United States; GEORGE BROKAW, Individually and as Collector of Customs, San Francisco, California; DOUGLAS DILLON, Individually and as Secretary of the Treasury of the United States,

Appellants,

vs.

LEIF HEILBERG,

Appellee.

APPELLEE'S BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

Regulations

Rules

Attorney General's Opinions

Congressional Hearings

Texts

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APPELLEE'S BRIEF

I.
STATEMENT OF THE CASE

A. How the Section 4008 Program Works

The constitutional infirmities of the mail screening program authorized by 39 U.S.C. § 4008 are best dis-

closed by an understanding of its operation. This understanding will disclose that the statute not only has unconstitutional applications as to "communist" printed matter from abroad, but also as to domestic mail and as to *all* mail from at least 28 countries (listed at R. 163-164) including countries normally thought of as non-communist or anti-communist.

The operation of the screening program was described in detail by Post Office and Customs spokesmen before the Subcommittee on Postal Operations of the Committee On Post Office and Civil Service of the House of Representatives on June 19 and 20, 1963. These hearings are printed under the title *Exclusion of Communist Political Propaganda From the U. S. Mails,* 88th Cong., 1st Sess. (1963) and are hereafter referred to as "Hearings on Propaganda."

(1) The Bureau of Customs decides what countries' mail shall be screened for "communist political propaganda." (Hearings on Propaganda, p. 28). This decision is made, according to Customs spokesman, Mr. Irving Fishman, on the basis of the statutory language "issued by or on behalf of any country" [39 U.S.C. § 4008(b)] and thus many non-communist countries, such as England, Canada, Japan, Mexico, Philippines, Taiwan and Hong Kong, are included because "communist" material is "printed or otherwise prepared" there.[1]

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[1]This exchange at p. 9 of the Hearings on Propaganda is descriptive of the method by which Customs makes a determination:

"Mr. Cunningham. Let us take England, for example. A

(2) All mail from the designated countries is routed to one of ten screening points known as "foreign propaganda units" or "propaganda screening units." (Hearings on Propaganda, pp. 7, 32; R. 41). These units have been specially created to operate the § 4008 program and are "jointly" operated by post office and customs personnel (R. 112; Hearings on Propaganda, p. 2). In most instances sealed letters, even though exempt by law, are routed to the propaganda screening unit because they come from abroad in bags containing a mixture of all kinds of foreign mail (Hearings on Propaganda, pp. 7, 39).[2]

(3) At the propaganda screening unit the mail is sorted and sealed letters not subject to the terms of the statute and "exempt"[3] mail is returned to the

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great deal of this comes from England, and it is published by Communist or Communist front groups.

Mr. Fishman. Yes.

Mr. Cunningham. That would be on behalf of, we will say, some Communist bloc nation.

Mr. Fishman. We have a little bit of a problem there, which I would like to explain briefly. The phrase 'issued by or on behalf of' invites a determination that the material is issued on behalf of. Short of making an investigation to determine whether the material was actually issued by or with funds from a Soviet bloc country, it is not a simple task to determine this. We have examined a great deal of material which comes from England, some of it published by known Communist front organizations or representatives thereof, and we have held some of this material, but I just wanted to explain the additional problem created by the search for material 'issued by or on behalf of.'"

[2]Post Office spokesman, Mr. Tyler Abell, testified: "Technically you are supposed to get sealed mail in one bag, AO mail in another bag, and parcel post in another bag. When you shake it out, this just doesn't jibe with the facts." Hearings on Propaganda, p. 39.

[3]"Exempt" means mail addressed to Federal government agencies, public libraries, scientific or professional institutes, or an official thereof, and material forwarded pursuant to a reciprocal cultural international agreement. 39 U.S.C. §4008(c).

post office for delivery (Hearings on Propaganda, pp. 40, 42). The delay as to these classes of mail may be not more than a day or two.

(4) The remaining mail from the designated countries is then given to Bureau of Customs examiners (Hearings on Propaganda, p. 3) who then [quoting the answer to interrogatory No. 9 to defendant George K. Brokaw, Collector of Customs in San Francisco (R. 176)] operate as follows: "If from the addressee and the addressor, the nature of the contents is already known, it is not opened and read. If the material is suspected, it is opened and read. The determination of whether or not it is propaganda material is made by the Assistant Deputy Commissioner [Mr. Fishman] *in New York.*" (Emphasis supplied.)[4] Occasionally, because of translation or other problems, mail will have to be sent from one screening unit to another for its preliminary reading. (Hearings on Propaganda, p. 31, note 2; the answer

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[4]A more detailed explanation of the transmission of all new material to New York was given by Mr. Fishman (Hearings on Propaganda, pp. 9-10) as follows:

"Mr. Fishman. The procedure we follow is approximately as follows: We have, of course, made available to our people a copy of the definition of political propaganda contained in the Foreign Agents Registration Act. As we see it, Communist political propaganda is political propaganda issued in these various countries or on behalf of such various countries. Each translator or analyst is required not only to reach a finding that a publication contains political propaganda, but justify it then by excerpts from the publication, from the newspaper or magazine, which bear out his finding. We have here for the committee some such excerpts from various newspapers, magazines, and so on, selected from the groups that we have held out. His finding is then reviewed not only by his immediate superior but also in our office in New York."

to Brokaw Interrogatory No. 8 [R. 176] indicates only Chinese, Japanese and Korean translators are available in San Francisco.)

(5) Non-propaganda is then returned to the post office for delivery. As to propaganda, § 4008(a) provides that it "will be delivered only upon the addressee's request, except . . . in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee." Under the Postmaster General's Regional Letter of March 1, 1965 (Government Brief, pp. 37-39), the Postmaster will not maintain "any record of those addresses who desire to receive communist political propaganda." Instead, as to each piece of mail or group of pieces of mail, the addressee will receive a notice on Form 2153-X.[5] This means that even after it has been classified as communist political propaganda, the mail will not be sent to the post office for delivery until a Form 2153-X is prepared, mailed, delivered to the addressee and returned by him. The notice indicates only the title of the publication and does not give the country of origin or preparation nor does it give the language of the publication (R. 10). The Postmaster General exercises some power to "otherwise ascertain" that the mail is desired, and in the case of radio and television stations, newspapers and magazines that

[5]This form is reproduced at R. 10. Information counsel has received indicates that Form 2153-X continues to be used in the screening program, but, to conform to the Postmaster General's Regional Letter of March 1, 1965, the bottom lefthand space for "similar publication" is blocked out.

desire is evidently presumed (Hearings on Propaganda, pp. 44, 46). However, matter which is "furnished pursuant to subscription" does not escape the delay of the Form 2153-X process because the propaganda unit can not maintain a record of the subscription, and the General Counsel of the Post Office Department has determined (see the letter of the General Counsel reproduced as Appendix I to this brief) that the law does not allow postal employees to accept the sender's notation that the matter is furnished pursuant to subscription.[6]

(6) The practice is to hold "communist political propaganda" mail 20 days after Form 2153-X is sent (Hearings on Propaganda, p. 29), and, if there is no request for delivery, the mail is destroyed. No provision is made to ascertain whether the notice has been actually received by the addressee so that mis-delivery or vacation schedules may cause mail to be destroyed. Throughout the country, from January of 1963 to July of 1964 out of 35,121 Form 2153-X notices sent, 15,031 were not returned at all; 4,524 were "undeliverable"; 8,947 were returned asking that no such mail be delivered; 6,721 were returned asking that all such mail be delivered; and 3,989 were re-

[6] We have great difficulty in following the statement at p. 15 of the government's brief that "any individual who wishes to have the propaganda delivered without further inquiry may put the Postmaster General on notice simply by a continuing request in a letter." How is this letter to be disseminated to all the screening units? And is not the retention of such a letter a violation of the Regional Letter of March 1 which states: "The Department will not, in the future maintain any record of the wishes of those addressees who desire to receive communist political propaganda"?

turned asking that the particular publication be delivered.[7]

Earlier we said that the screening program has application to domestic mail. There are but two records of this. The first appears in *McReynolds and Pappenheim v. Christenberry,* 233 F. Supp. 143 (*Cert. den.* Jan. 18, 1965; appeal from denial of three-judge court pending in Second Circuit). There Pappenheim alleged (the district judge wrote "the facts are not in dispute.") he purchased in New York City a number of books published in communist countries (233 F. Supp. at 145). He had the books mailed to his home in Cambridge, Massachusetts, but before they were delivered he received a Form 2153-X naming the books. He did not return the card but wrote letters to the postmaster asking for details and for an extension of time. No replies to his letters were received, but two months after he received the Form 2153-X, he received his books. The district judge wrote that the sending of the notice in this instance may have been "an error" (233 F. Supp. at 148). Nevertheless, the § 4008(a) authorizes detention of mail "upon its subsequent deposit in the United States domestic mails . . ." and it seems to have been the

[7]These statistics were furnished by Mr. Louis Doyle, General Counsel of the Post Office Department, to the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure and placed in the record of subcommittee hearings on February 24, 1965. That hearing is not as yet printed but counsel has the typewritten transcript and the statistics appear on page 258 et seq. thereof. The printed hearing will shortly be available. Note that the figures reflecting the disposition of the notices add to a larger number than the total notices sent. This is true of all such figures furnished by the Post Office. See R. 42-48.

intent of Congress that qualifying propaganda be detained no matter from what source it enters the U. S. mails.

The second record concerning domestic mail is an anticipation by Mr. Abell of post office action at pp. 49-50 of the Hearings on Propaganda:

> Mr. Cunningham. * * * Furthermore, this law is firm enough in that if this comes in by ocean freight for dissemination in our U.S. mails, you are not doing anything about it.
>
> Mr. Abell. Could I comment on that. You have brought that up several times.
>
> Mr. Cunningham. Yes, sir; and I am going to keep bringing it up.
>
> Mr. Abell. Fine. The Customs' testimony yesterday was rather a shock to the Post Office Department because it is our understanding, or has been, and I thought that this had been made clear among ourselves, that when this material comes in by ocean freight, Railway Express or air express, it is subject to customs' examination. It is not mail, it is not handled by us at this point, but it is looked at by customs, just the way they look at your suitcase or mine when we come into the United States from abroad. At that point we thought we had an understanding with Customs that they would notify us of the existence of this material and we could thereafter take steps to keep it out of the domestic mail.
>
> * * *
>
> Mr. Cunningham. * * * So this matter of ocean freight, this mail coming in by ocean freight and then dumped in the mail system is covered by the act——
>
> Mr. Abell. It is covered.

Mr. Abell's assertion here should make one skeptical concerning what happened to Mr. Pappenheim's books mailed from New York to Massachusetts.

B. History of Section 4008

We have attached to this brief as Appendix III a survey of government intervention against propaganda from abroad, from 1940 through the legislative history of the adoption of 39 U.S.C. § 4008 (sometimes known as the Cunningham Amendment) in late 1962. Much of this material is covered in greater detail in two articles; Schwartz and Paul, *Foreign Communist Propaganda In The Mails: A Report On Some Problems Of Federal Censorship,* 107 U. Pa. L. Rev. 621 (1959) and Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography,* 11 U.C.L.A. L. Rev. 805 (1964).

When the program commenced in 1940 under the authority of an opinion by then-Attorney General Robert Jackson (39 Ops. Att'y Gen. 535) it was conceived as an adjunct to the Foreign Agents Registration Act. Its purpose then was to confiscate material the content of which allegedly violated the Espionage Act of 1917. Under the same auspices, the program was revived in 1951 due to the pressure of the Korean war. But the critical fire of scholars, librarians, civil liberties groups and many individuals, caused the program to be changed from one of confiscation to one utilizing a notice-request procedure. Finally, on March 17, 1961, President Kennedy announced that following consultation with the Secretary of State, the Post-

master General, the Secretary of the Treasury, and the Attorney General, and following the unanimous recommendation of the Planning Board of the National Security Council, the screening program was being discontinued. The President and his advisers found no intelligence value in the program and found that it hindered our relations with communist countries. See the White House announcement reproduced as Appendix II of this brief and *New York Times*, March 18, 1961, page 8.

The present program is a direct copy of the program discontinued by President Kennedy, with the exception that its operation has statutory authority and exemptions are created by law. Though some members of Congress may have accepted the program under the illusion (see *infra*) that it would save the taxpayers money, and others because they believed it necessary to stop harassment of refugees from communist countries, the history of this type of government activity, and the particular legislative history of section 4008, leave no doubt that the purpose (as well as the effect) of the program was to inhibit the circulation of written material because of disagreement with its content. This was the finding of the court below which wrote (R. 221):

> A reading of the legislative history [footnote omitted] makes it abundantly clear that the purpose of the new legislation was primarily to control, restrict and prevent the delivery of matter found to be communist propaganda, an infringement upon the dissemination of ideas, and, therefore, a clear and direct invasion of First Amendment territory.

C. Statement of the Facts in the Court Below

The brief of the government eliminates certain essential facts of the case developed in the court below and therefore the case must be restated. On July 12, 1963, appellee received a Form 2153-X as set out at R. 10. The notice stated that a certain piece of mail was communist political propaganda and would be destroyed unless appellee's reply expressing a desire to receive the mail was received by August 2, 1963. On July 30, 1963, this suit was filed. Appellee alleged he desired to receive the mail *without* it being "delayed, labeled, read, screened, passed, detained, destroyed or otherwise processed pursuant to the terms of 39 U.S.C. § 4008." (R. 3). Appellee also alleged the existence of a list kept by defendants of persons desiring to receive "communist political propaganda" and that he did not want his name on the list for fear of adverse consequences.

On August 2, 1963, appellee brought on for hearing before a single district judge a motion for a temporary restraining order (R. 11; incorrectly styled a "preliminary injunction") to prevent the destruction of the mail pending the disposition of his suit. As soon as the case was called, a most unusual incident occurred when the Assistant United States Attorney (appearing to resist the motion on behalf of the defendants) engaged the attention of the appellee and personally handed him a letter (R. 15) which he represented was the subject matter of the motion for a temporary restraining order. Appellee's counsel announced that the purported delivery was not accepted

(R. 17) but the court ruled that the mail was no longer in danger of destruction and denied the temporary restraining order (R. 24-25). The action of the United States Attorney was consistent with the government's policy to attempt to moot other suits raising challenges to the validity of the screening program. See the affidavits at R. 36-40.

The government then moved to dismiss on the basis of mootness (R. 25) and the motion was denied without prejudice by a single judge (R. 34). The motion was renewed before a three-judge court (R. 35) and testimony was presented, since the motion was treated as one for summary judgment under Fed. Rules Civil Proc. 12 (b). Appellee testified that as a representative of the Universal Esperanto Association he receives and expected to continue to receive large quantities of foreign mail, much of it from communist countries (R. 115; see also R. 178-180). Appellee also testified that he is a citizen of Denmark but is considering applying for United States citizenship (R. 121). Appellee testified as to his objection to his mail being labeled (R. 130) and delayed (R. 131), and his fear that the fact that he indicated a desire to receive what the government had labeled "communist political propaganda" might be used against his citizenship application[8] (R. 134, 137), and might cause

[8]This was not an idle fear. In 1941 the Supreme Court of California decided *In re Bogunovic*, 18 Cal.2d 160. There the trial court and three judges of the District Court of Appeal (*In re Bogunovic*, 106 P.2d 247) had denied citizenship to the applicant. The Supreme Court reversed stating at 18 Cal.2d 165: "The fact adverse to the positive showing made by the applicant was his two years' subscription to the communist publication [a weekly

him to be called before an investigating committee (R. 139).

During appellee's testimony he identified and there was introduced in evidence (R. 126) Plaintiff's Exhibit No. 2 (R. 150-151) which was a Form 2153-X addressed to the Postmaster in New York City and purporting to be a message from appellee that he wanted "this publication" [the Form listed no publication; cf. the Form at R. 10] and "Similar Publication" delivered to him. The notice was postmarked as mailed in Washington, D.C. In fact appellee did not fill out this notice or instruct that it should be filled out for him (R. 125). It was conceded that the card was filled out by the Post Office Department and misdelivered to the appellee rather than the New York City Postmaster (R. 210). In this way appellee was forced to indicate his "desire" to receive "communist political propaganda" despite his unwillingness to allow his mail to be opened, read and delayed in compliance with the terms of section 4008.

The motion to dismiss was denied, and the case was submitted for decision after a pre-trial conference (R. 181 et seq.) and a brief trial hearing (R. 207 et seq.). The unanimous order enjoining the program is stayed pending this appeal (R. 225).

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paper in Yugoslav known as "Rodnik"], which had expired more than five years prior to his application. * * * The only reason apparent from the record for the order of denial was the fact that the applicant had read the communist party organ. . . ."

II.

SUMMARY OF ARGUMENT

At first blush, the propaganda screening program may seem to be only an inconvenience, a minor blemish on the face of freedom. When the pervasive effects of the program are appreciated, the blemish is seen to be a measure of the whole because its operation abridges freedom of speech and press in the most direct way, on the basis of political content. Not all these effects have been suffered directly by appellee, but this court has not hesitated to "take into account possible applications of the statute in other factual contexts besides that at bar" (*NAACP v. Button,* 371 U.S. 415, 432).

The right to receive the communication of intelligence, although affirmed by this court in *Martin v. Struthers,* 319 U.S. 141, 143, has not been a First Amendment battleground, as has the right to publish and distribute written material. However, the concept of *communication* has been the essence of this struggle, as no censor would object to publication and distribution if he could be assured that no passing on of ideas would take place, and no one would publish if he could not communicate.

Section 4008 results in governmental intervention abridging free communication of ideas because it deters the receipt of mail protected by the First Amendment for reasons other than the desire of the recipient not to receive it. Practice in the past shows that when the government has been informed of the receipt of "communist political propaganda," the in-

formation has been used against the recipient. Even under the present administrative practice, there is a sound basis for similar fears of misuse of information because Customs agents, who jointly administer the program, are free to keep lists and to disclose information.

By labeling mail "communist political propaganda" the government has glued on a "poison" label which deters communication in the same manner as did the "informal censorship" outlawed in *Bantam Books v. Sullivan,* 372 U.S. 58. Moreover, the registration requirement for the receipt of "communist" mail does not differ substantially from the registration requirement for delivery of a labor speech outlawed in *Thomas v. Collins,* 323 U.S. 516, despite the fact that there was no showing that a license to give the speech would not have been granted if applied for.

The screening program results in a delay in delivery of almost all mail from at least 28 countries. Whether this is but a day or two in the case of sealed (first class) letters, or a far longer period of time for "communist political propaganda," such detention for the purpose of examining and labeling political content abridges the First Amendment. Sequestration of material protected by the First Amendment, is prohibited under *A Quantity of Books v. Kansas,* 378 U.S. 205, when done for censorship purposes. There has been no showing of a compelling governmental need for these delays; nor is there a lack of alternative means to accomplish the alleged governmental purposes of the program without damaging constitutional freedoms.

Unfortunately, the administrative change to this program adopted while the case was pending in this court only adds to the delay in receipt of mail since an expression of desire must be received for *each* piece of mail found to be "communist political propaganda."

Appellee also argues an independent right of anonymity (*Talley v. California,* 326 U.S. 60) and a First Amendment right to be free of a search of mail for the purpose of suppressing its political content (*Marcus v. Search Warrant,* 367 U.S. 717). Moreover, the government has no power to inspect mail to evaluate it for its political content, as that power is reserved to the people under the Ninth and Tenth Amendments.

Appellee's right to be free of an unreasonable search and seizure is abridged by the screening program since any search made for an unconstitutional purpose is "unreasonable." Lastly, the inherent vagueness and overbroadness of the statutory standards for the operation of the screening program make it so arbitrary and unreasonable as to violate the guarantee of due process of law under the Fifth Amendment.

III.

ARGUMENT

A. SECTION 4008, IN PURPOSE AND EFFECT, IMPOSES A DIRECT RESTRAINT UPON THE CIRCULATION OF POLITICAL OPINION THROUGH THE UNITED STATES MAILS IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The First Amendment "was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957). It embraces the liberty of circulation through the mails, *Ex parte Jackson,* 96 U.S. 727 (1877), and it protects the right to receive information as well as the right to distribute information. *Martin v. Struthers,* 319 U.S. 141 (1942). Moreover, the "constitutional protection does not turn upon the 'truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times v. Sullivan,* 376 U.S. 254, 271. Where the legislative purpose of a congressional enactment is to restrict the free flow of political ideas and that purpose is effective as shown by injuries to the free flow of information, there is the clearest kind of invasion of First Amendment territory. The two main elements of this First Amendment invasion are legislative purpose and judicially cognizable injury.

The principal legislative purpose of section 4008 is the interference with the flow of certain political ideas into the United States (Opinion below at R. 221). The motives behind this purpose are immaterial, but the history described in Appendix III to

this brief and the legislative history of section 4008 make it clear that the First Amendment trespass is not a peripheral result of some legitimate purpose, such as an inspection for dutiable goods; rather the trespass has its basis in the political ideas of the material itself. We proceed to show that this has caused judicially cognizable injuries.

1. Deterrence

The three-judge court below unanimously found section 4008 unconstitutional under the First Amendment because it believed that the Post Office would be required to maintain a list of persons indicating a desire to receive "communist political propaganda," and that, given the past history of such lists,[9] this fact "cannot help but deter the free expression of ideas" (R. 221). The appellants have now attempted to take the sting out of that holding by adopting, for the time being, an administrative practice whereby post office personnel would administer the statute without the dangerous list (Regional Letter of March 1, 1965, Gov't Brief, pp. 37-39). Appellee is not reassured by this policy and still feels that the statute necessarily threatens to cause him and other persons harm because of their choice of reading materials.

The primary deterrent which was relied on by the court below and which furnishes historical precedent for the misuse of information obtained through past screening programs, is the fact that section 4008 is a

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[9] "[R]outinely turned over to the House Committee on Un-American Activities", R. 220. See also Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 829-30.

joint operation with both post office and Bureau of Customs personnel manning the propaganda units (R. 112; Hearings on Propaganda, p. 3). Each piece of mail coming to the screening unit must be handled by a Bureau of Customs employee unless it is either a sealed letter or exempt under section 4008(c). The recognition by the Post Office Department that the information obtained by its employees might be misused, and the steps taken to try to prevent that misuse, only highlight the total absence of such efforts by the Bureau of Customs. Customs employees are not preventing from noting the names of recipients of "communist political propaganda" and are not inhibited in the disclosure of this information. Yet it is the Customs officials who have provided the occasion for the fears expressed by addresses of material labeled under section 4008.[10]

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[10]Mr. Irving Fishman, Deputy Collector of Customs for New York, testified as follows before a House Committee concerning the predecessor to the Section 4008 screening program:

> "Mr. Arens: You have given the Committee, in private session, lists in great volume of the recipients of this communist propaganda, have you not?
>
> "Mr. Fishman: That is right."
>
> *(Hearings Before the House Committee on Un-American Activities*, 85th Cong., 2d Sess. 2794 (1958).)

More recently Mr. Fishman testified: "[W]e have been instrumental in furnishing a great number of the intelligence fraternity with information on what is coming into the country. We have been able to keep for example, the Department of Justice, the Foreign Agents Registration Section, aware of the activity of the foreign agents so that they can compare what we have given them with what the foreign agents report themselves each year, and we have been helpful to a great many other intelligence agencies." *(Hearings Before a Subcommittee of the House Committee on Appropriations, Treasury-Post Office Departments and Executive Office Appropriations for 1964*, 88th Cong., 1st Sess. 142 (1963).)

See also R. 120-123, 134, 137, 139; Brief for the Appellant in *Lamont v. Postmaster General*, No. 491, this Term, at p. 21.

That this deterrent effect is not fanciful is shown by appellee's testimony in this case (R. 139) and by his specially sensitive position as a potential applicant for citizenship (R. 134, 137; and see *In re Bogunovic,* 18 Cal. 2d 160, discussed in note 8, *supra*). Many other persons who might like to receive all mail from abroad and make their own decisions as to its character are in positions of even greater sensitiveness. The man whose ability to earn a livelihood is dependent upon holding a security clearance, or the school teacher whose contract is renewable only at will, could not, in many cases, invite disaster by reading what the government has warned them contains seeds of treason. The starkest proof that this is the case is contained in the statistics furnished by the Post Office Department showing that the most numerous classification for disposition of Form 2153-X notices is for those who fail to even return the notices (R. 42; see also text of this brief at page 6, *supra*).

That the Constitution provides protection against such inhibitions to the exercise of constitutional rights is made clear by *Shelton v. Tucker,* 364 U.S. 479, 485-487; *Gibson v. Florida,* 372 U.S. 539; *Talley v. California,* 362 U.S. 60; see also *United States v. Rumely,* 345 U.S. 40, 58 (concurring opinion); *Smith v. California,* 361 U.S. 147.

Even if there were no possible adverse consequences to an individual from his identification as a person who desired to receive "communist political propaganda," the mere fact that an official act is required (i.e. sending back to the government a completed

Form 2153-X) as a condition to the exercise of the First Amendment right to receive mail, is a violation of the Constitution under the ruling in *Thomas v. Collins*, 323 U.S. 516. There a labor union organizer was required to identify himself to an official before giving a speech. This was held to be unconstitutional without regard to whether there were any adverse consequences flowing from the requirement to register. The court said:

> As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. * * *
>
> If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirement of the First Amendment (323 U.S. at 539-540).

Still another view of deterrence is provided by *Bantam Books v. Sullivan*, 372 U.S. 58, which concerns itself with official discouragement of the exercise of First Amendment rights through a state's "educational" activities in the field of morals. The court found these practices unconstitutional, stating:

> "'We are not the first Court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." [Footnote omitted.] 372 U.S. at 67.

In our case, the substance of the program is to label certain mail with the name of a political and economic philosophy opprobrious to most Americans and touched with a tinge of treason. Certainly a citizen would not be amiss in believing that if the government goes to the trouble of sending him special notice of this labeling, there must be something wrong with the product. The official pronouncements of the United States Government carry much weight, and a judgment of worthlessness, or worse, will be heeded by many citizens.

Lastly under this topic, we must consider the provision of section 4008(a) reading ". . . upon its subsequent deposit in the United States domestic mails . . ." This simply means that there is the power to search for and to inspect and label material printed or otherwise prepared in a foreign country if it is issued "by or on behalf of" a communist country when it is mailed in the United States if it is not a sealed letter and is not addressed to an "exempt" person or agency.

If a U. S. citizen wanted to mail at the book rate Stalin's "Leninism" (printed in England) he would run the risk that the addressee would receive a Form 2153-X notice and decide not to claim the book. To avoid this procedure, the sender might be forced to send the book at first class rates, thus paying a tax to insure that his mail will not be labeled for its political content. Compare *Hannegan v. Esquire,* 327 U.S. 146. We recognize that there is no evidence of extensive application of the screening program to domestic mail, but the power exists and cannot avoid a deterrent effect on the freedom of the mails.

2. Delay

Marcus v. Search Warrant, 367 U.S. 717, and *A Quantity of Books v. Kansas,* 378 U.S. 205, are explicit holdings that detention of First Amendment material will only be countenanced for the shortest period of time, for a legitimate governmental purpose, and only if preceded by an adversary hearing and seized under a proper warrant. The latest figures furnished by the Post Office Department to the Senate Subcommittee on Administrative Practice and Procedure (see note 7, *supra*) show that from January of 1963 to July of 1964, 62 million pieces of mail from foreign countries have been channeled through foreign propaganda units. Of these, 27 million were sealed letters or addressed to exempt addresses. More than 34 million pieces of mail were examined by Customs employees, but only 2½ million pieces were found to be "communist political propaganda." As to

each of these categories various periods of delay are applicable, probably varying from a day to a month, but exact figures are not available. In any event, all delays for the purpose of screening and labeling mail on the basis of its political content are injuries to constitutional rights and a statute allowing such delays is unconstitutional. See also Part B, *infra*.

3. Search and Seizure

There is no constitutional objection to the requirement that goods brought into this country from abroad be submitted for inspection for dutiable or deleterious merchandise. But should a Customs agent, having this authority, tell me that he desired to inspect my luggage to see if there was anything worthwhile to steal, then his power would be subject to question.

Purpose is important. A ticking package may be opened by the Post Office to see if it contains a bomb, but not to see what time it is. A fourth class parcel may be refused delivery by the post office if it contains written letters as to which first class postage is due, but not if the postmaster finds the contents morally offensive (*Hannegan v. Esquire,* 327 U.S. 146).

Under the screening program created by 39 U.S.C. § 4008 the purpose of examining foreign mail is to label it and so interfere with and inhibit its delivery. The examination, then, is for an unconstitutional purpose and ipso facto an unreasonable search. So too is the detention an unreasonable seizure.

> "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power [of search]." (*Marcus v. Search Warrant,* 367 U.S. 717, 729 (1961)).

In the *Marcus* case the court struck down a statute which, as applied, authorized police officers to obtain a search warrant *ex parte* to search and seize matter which they deemed to be obscene. In emphasizing the special dangers of the search power in the area of free speech the court said:

> The authority to the police officers under the warrants issued in this case, broadly to seize "obscene . . . publications", poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" involved in the cases cited by the Missouri Supreme Court. [Citations.] For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications. * * * The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers . . . the selection of such magazines as in his view constituted "obscene . . . publications." * * * In consequence there were suppressed and withheld from the

market for over two months 180 publications not found obscene. (367 U.S. 717, 731, 732.)

Section 4008 is analogous to the statute struck down in *Marcus*. Administrative discretion is granted to postal and customs authorities to seize and detain all mail coming from designated countries and to classify it according to a definition which is wholly vague and uncertain. The result is that millions of pieces of mail matter, not classified as communist political propaganda, are withheld from addressees for long periods of time. The injury here involved is precisely the same as that involved in the *Marcus* case, and the delay in the circulation of expression protected by the First Amendment is thus caused by an unreasonable search and seizure.

4. Assumption of Undelegated Powers

If we accept the position of the Solicitor General, the government in enforcing section 4008 is acting in a hortatory role, but without forcing its will on anyone and without doing any damage to anyone's "rights." But this is not the measure of government's power under our system of law. We find no authority in the Constitution for the government, state or federal, to evaluate written material, to interpose itself between foreign governments and the people of this land and tell the latter what is propaganda and what is not, what is worthy of their interest, and what is not. We think that if anything was intended to be reserved to the people by the Ninth and Tenth Amendments, it was the power to evaluate their own

reading material without official interference giving the stamp of government approval or disapproval based on political content.

B. THE WHOLLY ARBITRARY ADMINISTRATION OF THE SCREENING PROGRAM, MADE UNAVOIDABLE BY VAGUE AND OVERBROAD STATUTORY STANDARDS, VIOLATES THE GUARANTEE OF DUE PROCESS OF LAW.

The addressee of international mail receives no notice that his property has entered into the screening program unless and until it is actually classified as "communist political propaganda." Then he has twenty days within which to return a notice, abandon the mail, or file suit, in which later case he will be considered as "desiring" the mail whether he likes it or not. No procedure was provided, and none was intended, for a hearing on the question of whether the classified material actually meets the statutory definition. The Solicitor General (Brief, p. 11) informs us that the very idea of a hearing is "frivolous."

We respectfully disagree with the Solicitor and believe that where the government sets itself up to do acts which may cause harm to the public on the basis of the existence of certain facts, the Fifth Amendment requires that an opportunity be given to test the existence *vel non* of those facts. To cite an example, suppose Mr. Fishman decided that England's *New Statesman* was regularly carrying articles issued "by or on behalf of" a communist country and the maga-

zine was "communist political propaganda", regardless of the balance of its content. This would mean that a subscriber would be faced with the fact that every issue of the *New Statesman* would be sent to the propaganda unit where, assuming that each issue would not have to be read and evaluated afresh, it would sit until a post office employee filled out a Form 2153-X and sent it on its way. It is not unusual for the *New Statesman* to be read on the West Coast, but its port of entry is almost certainly on the East Coast. Thus, allow two days for delivery of the notice. Assume that the subscriber is at home and not on vacation and that he promptly returns the notice. Allow two more days for return. Assume the post office is extremely efficient and can mail the periodical out the next day. So the *New Statesman* is delivered only five days later than usual and the subscriber can now reply to his friend at the university or in the State Department who asked him five days ago what he thought of Jones' piece in the current *New Statesman*.

Is this not an injury? And if the Customs Bureau has made an error in classification, should not the subscriber have the chance to present evidence that the *New Statesman* is not "communist political propaganda" to save himself from a continuing injury as to future copies of the periodical? Also is not the subscriber's source of information tainted in a redressable way when a detractor may dismiss it with the comment, "Oh, that's not reliable; the government says it's communist political propaganda"?

The vagueness and overbroadness of the definition of "communist political propaganda" have been discussed at pp. 29 *et seq.* of Appellant's Brief in No. 491, *Lamont v. Postmaster General.* To justify an invasion of the mails on the basis of these standards is to sanction a general search. The overbroadness of statutory authority has been a frequent subject of this court's action of late, as, for instance, *Aptheker v. Secretary of State,* 378 U.S. 500, 12 L. Ed. 2d 992, where the court held:

> It is a familiar and basic principle . . . that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." (12 L. Ed. 2d at 998, quoting from *NAACP v. Alabama,* 12 L. Ed. 2d 325, 338.)

Not only does the Customs Bureau have at its disposal a very broad definition of "communist political propaganda", but it has almost unlimited discretion as to what countries' mail to screen, only being limited by the words of section 4008(b): "Issued by or on behalf of any country [etc.] . . ."

Finally, the form of notice used by the authorities (R. 10) is misleading. The addressee is not informed that what is stated to be "communist political propaganda" may be from a non-communist country such as Mexico or Canada. He is not informed that the material may have been subsequently "deposited in the United States domestic mails."

C. THE GOVERNMENT HAS SHOWN NO COMPELLING NEED FOR THIS PROGRAM NOR HAS IT SHOWN THE LACK OF AVAILABLE ALTERNATIVES TO ACCOMPLISH ITS PURPOSE.

The Brief of the Solicitor General cites two governmental purposes accomplished by 39 U.S.C. § 4008. The first (Brief, p. 16) is to "protect the sensibilities of the addressees of communist propaganda who were affronted and often harassed by such mail, especially United States citizens of recent foreign origin." The second (Brief, p. 19), is to "deny foreign powers which refused a reciprocal exchange the benefit of having the United States subsidize the delivery of their propaganda to persons who either (a) did not want it or (b) did not subscribe[11] and had too little interest to mark a postcard indicating their desire for delivery."

The cases establish that where First Amendment freedoms are threatened, it is the burden of the government to prove a "subordinating interest which is compelling" (*Bates v. Little Rock*, 361 U.S. 516, 524; see also *Sherbert v. Verner*, 374 U.S. 398, 406) and to prove that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights" (*Sherbert v. Verner*, 374 U.S. 398, 407). Neither of these matters has been *proved* by the government, but appellee will seek to demonstrate that the two purposes advanced for the legislation do not meet the standard.

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[11]This phrase must have been written before the Postmaster General's Regional Letter of March 1, 1965.

As to mail which is offensive to recipients, we find it difficult to believe that those who desire not to read should have the power to infringe the constitutional rights of those who desire to read. We do not believe that the rights are on a parity. The value of the interest protected for the first group seems to be measured by the distance from the mail receptacle to the garbage can. Nevertheless, a complete alternative for the protection of persons who are offended by certain classes of mail is now and has been for years available. This is a post office regulation allowing a patron to authorize the postmaster not to deliver specifically described classes of foreign printed matter (Part 154.11 of the Postal Manual)[12] and, in addition, a post office patron may refuse delivery of any mail (39 C.F.R. 44.1(a)).

The second justification for the statute is to encourage exchange programs with foreign governments by denying a "subsidized" delivery of their propaganda. There is no evidence that any international reciprocal cultural agreements with the Communist bloc have been brought about because of the screening program, but in any event, the testimony is undisputed that (1) the quantity of mail from Communist countries has not decreased[13] and (2) the taxpayers are paying more money not to deliver the mail than it would cost to deliver it all.

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[12]Quoted in Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 847.

[13]Testimony of Mr. Fishman, Hearings on Propaganda, pp. 18, 19.

We send, by far, more mail to communist countries than they send to us. (Hearings on Propaganda, p. 56; Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 832.) The postage rates on international mail are administratively set (pursuant to statutory authority)[14] and a Post Office spokesman, General Counsel Louis A. Doyle, testified:

> I do not agree with Congressman Cunningham that a program administered under this program would serve to further reduce the gap between postal revenues and expenses. * * * International rates are set administratively and it will certainly remain our policy to keep the international service on a break-even basis by affecting changes whenever they are needed.[15]

The purported financial savings of this program result from not delivering unwanted mail. Congressman Udall established that this has been running to about 50,000 pieces of mail per year. (Hearings on Propaganda, p. 57.) The Customs Bureau spends some $230,000 per year on this program (Hearings on Propaganda, p. 14) and, more recently, a post office spokesman testified that his department was spending $300,000 per year on the program. (Hearings described in note 7, *supra*, p. 258.) This amounts to about $10 per piece of mail not delivered. This is not a very good record on which to go to the taxpayers.

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[14] 39 U.S.C. 505(a).

[15] *Hearings Before the Committee on Post Office and Civil Service of The United States Senate on H.R. 7927*, 87th Cong., 2d Sess. p. 841. And see Schwartz, *op. cit.*, supra, at Note 13, pp. 831-835.

IV

CONCLUSION

This unprecedented invasion of First and Fifth Amendment rights by Congress is an affront to our concept of freedom and ought to be struck out of our laws. The judgment of the court below was right and should be affirmed.

Dated, April 16, 1965.

Respectfully submitted,

MARSHALL W. KRAUSE,
COLEMAN A. BLEASE,
American Civil Liberties Union
of Northern California,
LAWRENCE SPEISER,
Attorneys for Appellee.

(Appendices Follow)

Appendix I

Post Office Department
Office of the General Counsel
Washington, D.C. 20260

In reply refer to
WFL:fr
42-A-4
February 25, 1965

Isidore G. Needleman, Esq.
165 Broadway
New York, New York 10038

Dear Mr. Needleman:

We are quite mindful of the provision in 39 U.S.C. 4008(a) that the detention-notice procedure "shall not be required in the case of any matter which is furnished pursuant to subscription. . . ."

We are also mindful that many foreign mailers of communist political propaganda place the notation "Subscription Copy" on unsolicited matter in an attempt to circumvent the application of the cited law. In view thereof, we would be remiss in our duty to the Congressional mandate to accept such notation without first seeking the addressee's delivery instruction. We certainly have no way of knowing whether any addressee is a bona fide subscriber to any particular matter without first having contacted him.

For the General Counsel:
Sincerely yours,
/s/ William F. Lawrence,
/s/ William F. Lawrence,
Associate General Counsel.

Appendix II

Immediate Release March 17, 1961

Office of the White House Press Secretary

THE WHITE HOUSE

President John F. Kennedy, following consultation with the Secretary of State, Dean Rusk, the Postmaster General, J. Edward Day, the Secretary of the Treasury, C. Douglas Dillon and Attorney General Robert. F. Kennedy, today ordered discontinuation immediately of the program intercepting communist propaganda from abroad.

A review by the four departments has disclosed that the program serves no useful intelligence function at the present time.

Discontinuance of the program was unanimously recommended by an ad hoc committee of the Planning Board of the National Security Council in a report of June 29, 1960. The Planning Board unanimously concurred in the recommendation of the committe, but the recommendation was not carried forward.

Since 1948 varying degrees of control have been exercised by the Bureau of Customs and the Post Office Department concerning the importation of communist political propaganda. Since 1951 the program has been extended to a spot check or censorship of all mail, except first class mail.

Not only has the intelligence value of the program been found to be of no usefulness, but the program also has been of concern to the Secretary of State in connection with efforts to improve cultural exchanges with communist countries.

Appendix III

LEGISLATIVE HISTORY

A. *1940-1961*

The history resulting in Section 4008 began in 1940 when Post Office officials seized large quantities of Nazi propaganda upon arrival in the United States. See generally for a detailed history of the screening program through 1958: Schwartz and Paul, *Foreign Communist Propaganda in the Mails: A Report On Some Problems Of Federal Censorship,* 107 U. Pa. L. Rev. 621 (1959), hereafter referred to as *Schwartz and Paul.* The legal justification for the seizures was found in an opinion by Attorney General Robert H. Jackson. See 39 Ops. Att'y Gen. 535 (1940); *Schwartz and Paul* p. 626. The opinion combined provisions of the Espionage Act and the Foreign Agents Registration Act. "As a consequence of this ruling, postal and customs men were apparently authorized to intercept and destroy any material which either agency considered political propaganda in aid of a foreign government, sent from abroad by any person who, prima facie, would appear to be a foreign agent if he were here." *Schwartz and Paul,* p. 627. The Attorney General's opinion was later incorporated as Rule 50 of the Department of Justice, 28 C.F.R. Sec. 5.50 (1949 ed.). The term "political propaganda" was defined by reference to the Foreign Agents Registration Act. The program of confiscation was discontinued at the end of World War II. *Schwartz and Paul,* p. 628.

With the advent of the Korean war, pressure was generated in the Congress for the resumption of the program but directed at Communist political propaganda. "Federal Bureau of Investigation Agents were notified about recipients who seemed to be getting propaganda in substantial quantities. . . ." *Schwartz and Paul*, p. 630, n. 24. And see Hearings To Investigate The Internal Security Act, 82nd Cong., 1st Sess. 64-65 (1951). The Senate Internal Security Committee carried on investigations of domestic disseminators of Communist propaganda. *Id.* at v.-ix . . .; 99 Cong. Rec. 3249-56 (1953). These congressional committees gave much of the impetus for the reinstitution of the propaganda program. See *e.g.* Hearings To Investigate The Internal Security Act, 83rd Cong., 1st Sess. 229 (1953).

The revitalized program was operated to confiscate and destroy matter found to be Communist political propaganda. After extensive criticism of the program and the failure of attempts to embody the program in legislation, the program was modified in 1956 to allow the "transmittal of propaganda to persons who have 'ordered or otherwise solicited such material'." *Schwartz and Paul*, p. 640; 28 C.F.R. Sec. 5.6 (Supp. 1962) In 1958 the program was further modified to permit the delivery of Communist political propaganda to persons who had indicated a desire for the matter. A system of notification was devised along with a concomitant system of listing persons who indicated a desire to receive propaganda. This program was carried on until March 17, 1961, when

President Kennedy discontinued the program after considering its impact on national security and foreign policy. See Appendix II.

"The justification for the program," according to the *Schwartz and Paul* article in 1959, "appears to be twofold: to protect the American public, from being swamped and seduced by subversive material; and to prevent the United States from subsidizing propaganda efforts by totalitarian enemies whom we are spending billions, at deficits, to combat." *Schwartz and Paul*, p. 623. The features of the program antedating President Kennedy's order were described by the General Counsel of the Post Office Department, Louis J. Doyle, in 1962 as follows:

> "Prior to 1958, an interception program relating to Communist propaganda was in effect. Under this program, printed matter arriving from Communist countries and thought to be Communist propaganda was delivered to addressees if they had specifically indicated they desired it, or if it was addressed to a registered foreign agent, a foreign embassy, a U.S. Government agency, a newspaper, a library or educational institution. In 1958, this policy was amended so that individual addressees who did not come within one of these exceptions were asked whether they wanted the propaganda material addressed to them. If they replied that they did, the material was delivered. Then on March 17, 1961 the interception program of asking individual addressees whether they wished to receive the material was discontinued." *Hearings Before The Committee On Post Office And Civil Service Of The U.S.*

Senate On H.R. 7927 (Postal Rate Revision of 1962), 87 Cong., 2d Sess. 841 (1962).

The reasons for discontinuing the program were explained by Doyle at the same hearings as follows:

"The decision was based on several factors. Among other things, it is important to note that a fairly small percentage of the material being screened had been withheld. In 1960, only about 5½ percent of all printed matter entering at New York City from Communist countries was excluded as propaganda not desired by the addressee.

During 1960, a committee of the National Security Council had recommended the discontinuance of the interception program. The recommendation had been accepted by the Planning Board of the National Security Council.

Also, six legal actions had been filed against the Government questioning the constitutional and legislative authority of the program. The Justice Department was convinced that the program lacked necessary legislative authority and lawyers in the Justice Department agreed that there was a substantial constitutional question which might possibly be resolved against the Government.

Another point which may not have been considered, but which is nonetheless important, is that many people such as researchers, scholars, and Government officials who needed this material complained that it was being unnecessarily delayed." *Id.* at 841-42.

Throughout the period before the discontinuance of the program it was clearly the policy of the Customs

Bureau to cooperate extensively with committees of the Congress, including the House Un-American Activities and the Senate Internal Security Sub-committee, in providing information regarding the operation of the program and the names of addressees of Communist propaganda. "For the close liaison between the Un-American Activities Committee and enforcement officials, see Hearings Before The House Committee On Un-American Activities, 85th Cong., 2d Sess. 2425-27 (1958)." *Schwartz and Paul*, p. 631. A most frequent witness on Communist propaganda during the period in question was Mr. Irving Fishman, then and now, Deputy Director of Customs for New York City. For example, the *Annual Report For The Year 1958 Of The Committee On Un-American Activities* reveals the extraordinary "cooperation" of Mr. Fishman in that year: "Mr. Fishman . . . testified at the New England area hearings, which were held on March 14, 18, 19, 20, and 21, 1958, regarding the influx of foreign Communist propaganda into the New England area." (p. 38). "On June 11 and 12, 1958, hearings based exclusively on Communist propaganda and its dissemination were resumed in Washington, D.C. * * * Mr. Irving Fishman testified that two of the principal channels for capturing the minds of youth were revealed to be the International Union of Students . . . and the World Federation of Democratic Youth. . . ." (p. 39); "At the area hearing held in Atlanta, Georgia, on July 29, 30 and 31, 1958 . . . Mr. Irving Fishman, Deputy Collector of Customs, New York City, testified that residents of the South . . .

were targets for Communist propaganda from abroad. * * * In his testimony, Mr. Fishman described the type of Communist propaganda . . . destined for a number of these Southern States: * * * It is sent to people who probably will disseminate and redistribute it in domestic and local publications." (p. 40); "Communist propaganda and its dissemination were again a focal point at the committee hearings which were held in Newark, N.J., during September 1958. According to . . . Mr. Irving Fishman, the State of New Jersey ranks fifth in the volume of foreign propaganda received from overseas. * * * Mr. Fishman stated that in order to achieve the dissemination of all such foreign propaganda material within the United States it is absolutely necessary for the people in foreign countries who are putting out this material to have the cooperation of individuals within the United States." (pp. 40-41). In the same year Mr. Fishman was asked by the committee:

> "Mr. Arens. You have given the Committee, in private session, lists in great volume of the recipients of this Communist propaganda, have you not?
>
> Mr. Fishman. That is right."
>
> *Hearings, House Committee On Un-American Activities*, 85th Cong., 2d Sess. p. 2794 (1958).

B. *The Adoption of Section 4008*

The Congressional response to the discontinuance of the Communist propaganda screening program by President Kennedy on March 17, 1961 was immediate. Four days after discontinuance Congressman Walter

introduced H.R. 5751 (87th Cong., 1st Sess.) to create a "Comptroller of Foreign Propaganda" with vague powers to screen incoming Communist mail. The bill was referred to the House Un-American Activities Committee and reported out without amendment on April 26, 1961. H.R. Rep. 309, 87th Cong., 1st Sess. (1961).

While the Walter bill was awaiting floor debate on June 29th a new postal rate revision bill, H.R. 7927, was introduced and referred to the House Post Office Committee. And on August 31st, Congressman Glenn Cunningham of Nebraska introduced a bill, H.R. 9004, to empower the Postmaster General to set up a new Communist propaganda program. The bill amended Section 505(a) of Title 39 of the United States Code, which empowers the Attorney General to enter into international postal arrangements and to adjust international postal rates, to provide:

> "In furtherance of this authority to counteract adverse usage of the mails and to reduce the domestic postal deficit, no international mail handling arrangement under which any postal rate, whether or not reciprocal, is established, shall permit the receipt, handling, transport, or delivery by the United States Post Office Department of mail matter determined by the Attorney General to be Communist political propaganda.
>
> No United States postal rate shall be available for the receipt, handling, transportation or delivery of mail matter determined by the Attorney General of the United States to be Communist political propaganda financed or sponsored di-

rectly or indirectly by a Communist-controlled government."

On introducing the H.R. 9004, Congressman Cunningham declared:

> "I have today introduced a bill to stop the flow of Communist propaganda into this country. I think that many of us are disturbed with the order of the present administration of March 17 which allows this Communist propaganda to come into this country freely and be distributed by the United States postal system free of charge. * * *
>
> I think this is one of the most serious problems we have, to stop this Communist propaganda coming into our country. It is the technique of the Communists to work on the young minds of the various nations." 107 Cong. Rec. 17814 (1961).

Many Congressmen joined in congratulating Cunningham for introducing H.R. 9004. All of them echoed his views. Congressman Judd (late of Minnesota), for example, said:

> "It is really incredible that we should allow an avowed and powerful enemy to be pouring poisonous propaganda into the minds of our own youth . . . the untrained and immature minds of our youth." *Id.* at 17815.

No action was taken directly on H.R. 9004. But when the postal rate revision bill, H.R. 7927, was reported out of the House Post Office Committee, it contained the provisions of the Cunningham bill as section 12. The committee report stated that the Cunningham amendment (as it came to be known in

debate) was "for the *purpose* of *excluding* the Communist political propaganda from the U.S. mails." H.R. Rep. No. 1155, 87th Cong., 1st Sess. (1961). (Emphasis added.)

A week later, on September 18, 1961, Congressman Walter moved for consideration of his bill, H.R. 5751, which had been greatly amended. Instead of a screening program, the bill now only required the Postmaster General to post notices in post offices and notify recipients of mail that large quantities of Communist propaganda were being sent through the mails. The bill specifically said: "Nothing in this section shall be deemed to authorize the Postmaster General to open, inspect or censor any mail." Representative Walter attacked the Cunningham amendment as "so vague and ambiguous as to render it incapable of a meaningful legal construction." He also said that "there are substantial doubts as to its constitutionality." 107 Cong. Rec. 20052 (1961). Cunningham answered that the Walter bill was a "powder-puff approach and it certainly will not do what the American people want the Congress to do, and that is to stop this subsidizing of Communist political propaganda." *Id.* at 20054.

The Walter bill passed the House, was sent to the Senate Judiciary Committee and quickly reported out, but bogged down on the Senate floor. This was the status at the end of the 1st Session of the 87th Congress.

In January of 1962, after Congress reconvened, the postal rate revision bill, H.R. 7927, was gutted

and a virtually new bill inserted under the same number. 108 Cong. Rec. 739 (1962). But one section remained intact—the Cunningham amendment. The new bill was brought up for debate on January 23, 1962. After a reiteration of the remarks made about the Walter bill by Cunningham and others, the bill was passed, 108 Cong. Rec. 827 (1962). The only dissenting voice came from Congressman Ryan of New York who branded the Cunningham amendment as "a program of censorship and interception of incoming foreign mail." *Id.* at 769. An attempt to delete the Cunningham amendment by Ryan was defeated by a vote of 2-127. *Id.* at 770.

On January 25, 1962, H.R. 7927 reached the Senate and was sent to the Committee on Post Office and Civil Service. On the same day Senator Prescott Bush introduced S. 2740 containing an amendment to the postal code on Communist propaganda. The amendment provided:

> "Mail matter which originates in a foreign country and which is determined by the Postmaster General to be Communist political propaganda shall be detained by the Postmaster General and the addressee shall be notified that such matter has been received and will be delivered only upon his request. If no request for delivery is made by the addressee within a reasonable time, the matter detained shall be disposed of as the Postmaster General directs. The provisions of this section shall not be applicable with respect to matter addressed to an officer or agency of the Government, a library, or a college or university."

On introducing the bill, Senator Bush said:

> "This legislation is needed to counteract the unfortunate effects of an Executive order, issued on March 17, 1961, in which the President ordered an immediate discontinuation of a program . . . to intercept Communist propaganda from abroad.
>
> The White House, undoubtedly acting upon advice of the Department of State, said the program was being discontinued to help 'improve cultural exchanges with Communist countries.'
>
> It is difficult to understand how subjecting the American people to a continual barrage of unsolicited and unwanted Communist propaganda can improve our relations with the Communist conspiracy which has sworn to overthrow our free institutions." 108 Cong. Rec. 869 (1962).

The Senate Post Office Committee had hearings on the Cunningham amendment to H.R. 7927 (Section 12) on August 21 and 23, 1962. *Hearings Before The Committee On Post Office And Civil Service Of The U.S. Senate On H.R. 7927 (Postal Rate Revision Of 1962)*, 87 Cong., 2d Sess., pp. 827-977 (1962). An extensive array of government and private witnesses appeared in opposition to the Cunningham amendment. The witnesses included the Departments of Justice, Post Office, Treasury, United States Information Agency, Office of Science Information Service of the National Science Foundation, and the Library of Congress. The Department of Justice was represented by Nicholas deB. Katzenbach, now Attorney

General and Byron R. White, now Mr. Justice White. Mr. White stated:

> "A free society of course involves risks that some of its members will be misled by untruths or propaganda. On the other hand, in view of the experiences of authoritarian countries over the years, the judgment in this country so far has been that the risks of such a system are greater than one in which an executive officer determines what citizens may or may not read. Section 12 of H.R. 7927 would be a significant move toward the latter type of system. Obviously in the world today, the postal services are among the most important means by which the printed word is spread. . . . [Section 12] would not, as its sponsors claim, simply relieve the people of the United States of the burden of paying for the distribution of Communist political propaganda. It would also frequently operate to deny them the right to receive any such material upon a determination by the Attorney General." *Id.* at 832-833.

The Post Office Department was represented by its General Counsel, Louis J. Doyle and by Tyler Abell, Special Assistant to the Postmaster General. Mr. Doyle said:

> "Probably the biggest problem in administering section 12 would be the one of setting up screening points. * * * As I see it, mail would have to be screened at every one of our 45,000 postal locations, or else *delayed* while it was routed through central screening points. * * *
>
> I do not agree with Congressman Cunningham that a program administered under this program

would serve to further reduce the gap between postal revenues and expenses. * * * International rates are set administratively, and it will certainly remain our policy to keep the international service on a break even basis by effecting changes whenever they are needed.

A check of 32 of our largest post offices shows that there have been very few complaints from people actually receiving what they consider to be Communist propaganda. New York City has been averaging 35 complaints a month. At the other large offices we have had anywhere from no complaints at all to one a week." *Id.* at 841-43. (Emphasis added.)

On September 24, 1962, the Senate Post Office Committee reported out its version of H.R. 7927. S. Rep. No. 2120, 87th Cong., 2d Sess. (1962). Included in the bill was a new section 305 on Communist political propaganda. It was a modification of Senator Bush's proposal, S. 2740, and identical to the present Section 4008. 108 Cong. Rec. 20694 (1962). On the following day H.R. 7927 came up for debate on the Senate floor. The principal opposition to Section 305 came from Senator Joseph Clark, who had filed a dissent to the Post Office Committee's inclusion of Section 305. S. Rep. No. 2120, 87th Cong., 2d Sess. at 42-44. Clark first offered an amendment to delete Section 305. It was defeated on a voice vote. 108 Cong. Rec. 20852 (1962). He then offered a substitute incorporating the substance of Congressman Walter's H.R. 5751. It was defeated by a vote of 51-23. *Id.* at 20979. Lastly, Senator Clark attempted an amendment to provide that

Section 305 become operative only when the President determined that it was in the national security interest to do so. This last amendment was also defeated—by a vote of 48-23. *Id.* at 20987. However, the Senate did add an amendment to H.R. 7927 (Section 307) permitting addressees to request Post Office withholding of obscene matter. *Id.* at 21007.

The debate on the Cunningham amendment occupies many pages of the Congressional Record. See 108 Cong. Rec. 20630-20645; 20841-20854; 20977-20989 (1962). Senator Bush, whose proposal served as the basis of Section 305; said:

> "The amendment Senators have been discussing has been referred to as the Cunningham amendment. Actually it is a modification of a bill which I introduced on January 25. It is referred to in the committee report in that way. * * *
>
> The amendment to the committee bill . . . merely reinstates the policy which was adopted under President Truman and followed under President Eisenhower. It was discontinued in the Kennedy administration, on the theory that it served no useful purpose. However, it is interesting to note that in 1960 the number of pieces of Communist printed matter turned over by the Post Office Department to the Customs Service, excluding first-class mail, was 21,607,000.
>
> The most vicious propaganda campaign is being conducted against the United States by both Communist China and Communist Russia. Inasmuch as the Communist Party is outlawed by the United States . . .; it is not unreasonable for us to restrict propaganda of a Communist nation, to the extent

at least, that the people of this country want it restricted." 108 Cong. Rec. 20982 (1962).

Senator Clark engaged in an extensive discussion of the defects of Section 305. He inserted in the record extensive excerpts from the article by Schwartz and Paul demonstrating the long-standing policy of postal censorship of Communist mail. 108 Cong. Rec. 20638-20645 (1962). With respect to the Senate changes in the Cunningham amendment he said:

> "Although the Senate version opens up loopholes and lets certain Communist propaganda filter through, nevertheless, it sets up a detention system with respect to the bulk of so-called Communist propaganda, and the recipients would not get the mail unless they take affirmative action. That is censorship, and censorship is prohibited by the first amendment . . .
>
> ". . . we insult and affront perhaps 95 percent of the American people by the amendment, which says to them in effect, 'You are only a little boy. You may be influenced. You are not a free American citizen. You cannot make up your mind . . . So we will detain your mail and tell you we have it and how evil it is. Later on you may get it, if you take certain actions which may jeopardize your reputation.'." 108 Cong. Rec. 20843 (1962).

The Senate passed H.R. 7927 overwhelmingly. And the Senate version of Section 305 on Communist propaganda was approved by a Conference Committee, 108 Cong. Rec. 22197, 22231-2 (1962), and adopted by both houses. *Id.* at 22604. Congressman Cunningham

was elated at the adoption of the provision on Communist propaganda.

> "The House had a very strong . . . section in its bill known as Section 12, the so-called Cunningham amendment. Like the House version I want to say that this amendment in the conference report is a very strong and worthwhile amendment to stop the free delivery of Communist propaganda in the United States postal system. In my opinion it will stop at least 95 percent of Communist political propaganda from being delivered in the United States. It is going to be easily administered; it is going to stop this vicious material from coming into this country and being delivered free. *Section 305 of the conference report accomplishes the same thing as would Section 12 in the House-passed version.*" 108 Cong. Rec. 22601 (1962). (Emphasis added.)

SUPREME COURT OF THE UNITED STATES

Nos. 491 and 848.—October Term, 1964.

Corliss Lamont, dba Basic Pamphlets, Appellant, 491 *v.* Postmaster General of the United States.	On Appeal From the United States District Court for the Southern District of New York.
John F. Fixa, Individually and as Postmaster, San Francisco, California, et al., Appellants, 848 *v.* Læif Heilberg.	On Appeal From the United States District Court for the Northern District of California, Southern Division.

[May 24, 1965.]

Mr. Justice Douglas delivered the opinion of the Court.

These appeals present the same question: is § 305 (a) of the Postal Service and Federal Employees Salary Act of 1962, 76 Stat. 840, constitutional as construed and applied? The statute provides in part:

> "Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in

the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee." 39 U. S. C. 4008 (a).

The statute defines "communist political propaganda" as political propaganda (as that term is defined in § 1 (j) of the Foreign Agents Registration Act of 1938)[1] which is issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions or from which foreign assistance is withheld pursuant to certain specified statutes. 39 U. S. C. § 4008 (b). The statute contains an exemption from its provisions for mail addressed to government agencies and educational institutions, or officials thereof, and for mail sent pursuant to a reciprocal cultural international agreement. 39 U. S. C. § 4008 (c).

To implement the statute the Post Office maintains 10 or 11 screening points through which is routed all unsealed mail from the designated foreign countries. At these points the nonexempt mail is examined by Customs

[1] "The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence." 22 U. S. C. § 611 (j).

authorities. When it is determined that a piece of mail is "communist political propaganda," the addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days.

Prior to March 1, 1965, the reply card contained a space in which the addressee could request delivery of any "similar publication" in the future. A list of the persons thus manifesting a desire to receive "communist political propaganda" was maintained by the Post Office. The Government in its brief informs us that the keeping of this list was terminated, effective March 15, 1965. Thus, under the new practice, a notice is sent and must be returned for each individual piece of mail desired. The only standing instruction which it is now possible to leave with the Post Office is *not* to deliver any "communist political propaganda." [2] And the Solicitor General advises us that the Post Office Department "intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently."

No. 491 arose out of the Post Office's detention in 1963 of a copy of the *Peking Review #12* addressed to appellant, Dr. Corliss Lamont, who is engaged in the publishing and distributing of pamphlets. Lamont did not respond to the notice of detention which was sent to him but instead instituted this suit to enjoin enforcement of the statute, alleging that it infringed his rights under the First

[2] A Post Office regulation permits a patron to refuse delivery of any piece of mail (39 C. F. R. § 44.1 (a)) or to request in writing a withholding from delivery for a period not to exceed two years of specifically described items of certain mail, including "foreign printed matter." *Ibid.* And see Schwartz, The Mail Must Not Go Through, 11 U. C. L. A. L. Rev. 805, 847.

and Fifth Amendments. The Post Office thereupon notified Lamont that it considered his institution of the suit to be an expression of his desire to receive "communist political propaganda" and therefore none of his mail would be detained. Lamont amended his complaint to challenge on constitutional grounds the placement of his name on the list of those desiring to receive "communist political propaganda." The majority of the three-judge District Court nonetheless dismissed the complaint as moot, 229 F. Supp. 913, because Lamont would now receive his mail unimpeded. Insofar as the list was concerned, the majority thought that any legally significant harm to Lamont as a result of being listed was merely a speculative possibility, and so on this score the controversy was not yet ripe for adjudication. Lamont appealed from the dismissal, and we noted probable jurisdiction. 379 U. S. 926.

Like Lamont, appellee Heilberg in No. 848, when his mail was detained, refused to return the reply card and instead filed a complaint in the District Court for an injunction against enforcement of the statute. The Post Office reacted to this complaint in the same manner as it had to Lamont's complaint, but the District Court declined to hold that Heilberg's action was thereby mooted. Instead the District Court reached the merits and unanimously held that the statute was unconstitutional under the First Amendment. 236 F. Supp. 405. The Government appealed and we noted probable jurisdiction. 379 U. S. 997.

There is no longer even a colorable question of mootness in these cases, for the new procedure, as described above, requires the postal authorities to send a separate notice for each item as it is received and the addressee to make a separate request for each item. Under the new system, we are told, there can be no list of persons who have manifested a desire to receive "communist political

propaganda" and whose mail will therefore go through relatively unimpeded. The Government concedes that the changed procedure entirely precludes any claim of mootness and leaves for our consideration the sole question of the constitutionality of the statute.

We conclude that the Act as construed and applied is unconstitutional because it requires an official act (*viz.* returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, 437 (dissenting): "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ."[3]

We struck down in *Murdock* v. *Pennsylvania*, 319 U. S. 105, a flat license tax on the exercise of First Amendment rights. A registration requirement imposed on a labor union organizer before making a speech met the same fate in *Thomas* v. *Collins*, 323 U. S. 516. A municipal licensing system for those distributing literature was held invalid in *Lovell* v. *Griffin*, 303 U. S. 444. We recently reviewed in *Harman* v. *Forssenius*, 380 U. S. —, an attempt by a State to impose a burden on the exercise of a right under the Twenty-fourth Amendment. There, a registration was required by all federal electors who did not pay the state poll tax. We stated:

> "For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equiva-

[3] "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare." *Pike* v. *Walker*, 121 F. 2d 37, 39. And see Gellhorn, Individual Freedom and Governmental Restraints (1956), p. 88 *et seq.*

lent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.*, p. —.

Here the Congress—expressly restrained by the First Amendment from "abridging" freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage. Nor do we reach the question whether the standard here applied could pass constitutional muster. Nor do we deal with the right of customs to inspect material from abroad for contraband. We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in

sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270.

We reverse the judgment in No. 491 and affirm that in No. 848.

It is so ordered.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 491 AND 848.—OCTOBER TERM, 1964.

Corliss Lamont, dba Basic Pamphlets, Appellant, 491 *v.* Postmaster General of the United States.	On Appeal From the United States District Court for the Southern District of New York.
John F. Fixa, Individually and as Postmaster, San Francisco, California, et al., Appellants, 848 *v.* Leif Heilberg.	On Appeal From the United States District Court for the Northern District of California, Southern Division.

[May 24, 1965.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE GOLDBERG joins, concurring.

These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees would then have to establish their standing to vindicate the senders' constitutional rights, cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 486, as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of foreign government, cf. *Johnson* v. *Eisentrager*, 339 U. S. 763, 781–785. However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment "necessarily protects the right to receive it." *Martin* v. *City of Struthers*, 319 U. S. 141, 143. Since the decisions today uphold this contention, I join the Court's opinion.

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, *e. g.*, *Bolling* v. *Sharpe*, 347 U. S. 497; *NAACP* v. *Alabama*, 357 U. S. 449; *Kent* v. *Dulles*, 357 U. S. 116; *Aptheker* v. *Secretary of State*, 378 U. S. 500. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Even if we were to accept the characterization of this statute as a regulation not intended to control the content of speech, but only incidentally limiting its unfettered exercise, see *Zemel* v. *Rusk*, 381 U. S. —, —, we "have consistently held that only a compelling [governmental] interest in the regulation of a subject within [governmental] constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438. The Government's brief expressly disavows any support for this statute "in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry." Rather the Government argues that, since an addressee taking the trouble to return the card can receive the publication named in it, only inconvenience and not an abridgment is involved. But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, *e. g.*, *Freedman* v. *Maryland*, 380 U. S. 51; *Garrison* v. *Louisiana*, 379 U. S. 64; *Speiser* v. *Randall*, 357 U. S. 513. The registration requirement which was struck down in *Thomas* v. *Collins*, 323 U. S. 516, was not appreciably more burdensome.

Moreover, the addressees' failure to return this form results not only in nondelivery of the particular publication but also of all similar publications or material. Thus, although the addressee may be content not to receive the particular publication, and hence does not return the card, the consequence is a denial of access to like publications which he may desire to receive. In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one. As the Court said in *Boyd* v. *United States*, 116 U. S. 616, 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The Government asserts that Congress enacted the statute in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. But the sensibilities of the unwilling recipient are fully safeguarded by 39 C. F. R. § 44.1 (a) (Supp. 1965) under which the Post Office will honor his request to stop delivery; the statute under consideration, on the other hand, impedes delivery even to a will-

ing addressee. In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose. Cf. *Butler* v. *Michigan*, 352 U. S. 380. The argument that the statute is justified by the object of avoiding the subsidization of propaganda of foreign governments which bar American propaganda needs little comment. If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights. Cf. *Speiser* v. *Randall*, *supra*. That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.

MR. JUSTICE HARLAN concurs in the judgment of the Court on the grounds set forth in this concurring opinion.